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Recent Decisions

PARENT AND CHILD — RIGHT OF RECOVERY FOR PERSONAL INJURY BY CHILD AGAINST PARENT

The recent case of *Signs v. Signs*[1] marked a further step in the trend away from the general rule that an unemancipated minor child cannot maintain a suit for personal injuries against his parent. Although that rule had been followed in Ohio courts of appeals,[2] the *Signs* case presented to the Ohio Supreme Court for the first time the question of its application. The court held that the unemancipated minor son of a partner in a trucking concern could recover damages from his father and the other partner for personal injuries arising from their negligent maintenance of a defective gasoline pump.[3]

It should be noted that the court's allowance of recovery was not founded upon the father's membership in a partnership of which other members would also be liable. It appears that no different result would be reached if the father were being sued for injuries arising out of the father's operation of a business by himself.

While before 1891 there seems to have been no case in England or America to the effect that a parent is not civilly liable for a personal tort to his minor child, the rule seems to have existed upon tradition and usage of society.[4] The first judicial pronouncement of the rule of parental immunity came in 1891 in the American case of *Hewlett v. George*.[5] The court held that a minor child could not bring an action against her mother for damages arising from the mother's wrongful confinement of the child in an insane asylum. The court, citing no authority, based its decision upon the ground that such an action disturbs the peace and harmony of the family and is thus contrary to public policy.

Largely because of the increased use of the automobile after 1891, many personal injury actions between an unemancipated child and his parent have come before the courts. Most of these cases were decided in accord with the result of the *Hewlett* case.[6] Various reasons have been advanced

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[1] 156 Ohio St. 566, 103 N.E.2d 743 (1952).

[2] Krohngold v. Krohngold, 12 Ohio L. Abs. 631, 181 N.E. 910 (1932); Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931).

[3] *Contra,* Belleson v. Skilbeck, 185 Minn. 537, 242 N.W 1 (1932).

[4] For an excellent discussion of the origins, development and reasons supporting the rule of parental immunity, see McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1056 (1930)

See also COOLEY, TORTS 171 (1879); EVERSLEY, DOMESTIC RELATIONS 601 (1885); REEVE, DOMESTIC RELATIONS 420 (3rd ed. 1862).

[5] 68 Miss. 703, 9 So. 885 (1891).

[6] Villaret v. Villaret, 169 F. 2d 677 (D. C. Cir. 1948); Rambo v. Rambo, 195 Ark. 832, 114 S.W 2d 468 (1938); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl.

by the courts for taking this position. They include protection of domestic tranquility,[7] prevention of depletion of the parent's funds to the detriment of other children,[8] adequate protection of the child through the criminal laws,[9] and a rule of the common law forbidding such actions.[10]

Although the rule precluding actions for personal injuries between parent and child has been widely followed, a growing number of courts have refused to follow the majority view.[11]

Modification of the general rule in a few recent cases has been based upon the state of the parent's mind at the time he committed a personal

753 (1929); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Luster v. Luster, 299 Mass 480, 13 N.E. 2d 438 (1938); Elias v. Collins, 237 Mich. 175, 211 N.W 88 (1926); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W 1 (1932) (partnership held not liable); Mannion v. Mannion, 3 N. J. Misc. 68, 129 Atl. 431 (1925); Cannon v. Cannon, 287 N. Y. 425, 40 N.E. 2d 236 (1942); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N.E. 551 (1928); Ciani v. Ciani, 127 Misc. Rep. 304, 215 N. Y. Supp. 767 (1926); Small v. Morrison, 185 N. C. 577, 118 S.E. 12 (1923); Krohngold v. Krohngold, 12 Ohio L. Abs. 631, 181 N.E. 910 (1932); Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 227 (1931); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); Turner v. Carter, 169 Tenn. 553, 89 S.W 2d 751 (1936); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905) (recovery denied in extreme case of rape); Securo v. Securo, 110 W Va. 1, 156 S.E. 750 (1931); Segall v. Ohio Casualty Co., 224 Wis. 379, 272 N. W 665 (1937); Wick v. Wick, 192 Wis. 260, 212 N.W 787 (1927). *See* Zutter v. O'Connell, 200 Wis. 601, 607, 229 N.W 73, 76 (1930) (general rule precluded right of contribution from father who was concurrently negligent).

[7] Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Luster v. Luster, 299 Mass. 480, 13 N.E. 2d 438 (1938); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Manion v. Manion, 3 N. J. Misc. 68, 129 Atl. 431 (1925); Small v. Morrison, 185 N. C. 577, 118 S.E. 12 (1923).

The allowance of actions between parent and child for torts relating to property by the same courts which disallow personal tort actions for reasons of domestic tranquility seems illogical since the possibility of bitter family dispute is no more remote in suits based on property rights than in those cases on personal rights.

[8] Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[9] Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Cook v. Cook, 232 Mo.App. 994, 124 S.W 2d 675 (1939); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W 664 (1903); Wick v. Wick, 192 Wis. 260, 212 N.W 787 (1927). OHIO GEN. CODE §§ 1639-46, 12970 provide criminal penalties for parental mistreatment of a child. Most other states have similar statutory provisions.

[10] Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Elias v. Collins, 237 Mich. 175, 211 N.W 88 (1926); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W 1 (1932); Damiano v. Damiano, 6 N. J. Misc. 849, 143 Atl. 3 (1928); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[11] It should be noted that the rule has not been applied to suits involving other family relationships. Rozell v. Rozell, 281 N. Y. 106, 22 N.E. 2d 254 (1939) (brother and sister); Spaulding v. Mineah, 264 N. Y. 589, 191 N.E. 578 (1934) (grandparent and grandchild); Munsert v. Farmers Mutual Auto Ins. Co., 229 Wis. 581, 281 N. W 671 (1938) (brother and sister).

tort upon his child. Although this ground had been commented upon in dicta,[12] it was not until 1950 that a court, in *Cowgill v. Boock*,[13] held that recovery would be allowed where the parent was guilty of wilful misconduct, not merely negligence. A similar view was expressed in *Mahnke v. Moore*,[14] where it was held that a minor daughter could sue her father's estate for psychic shock since justice demands that a parent be liable for injuries to his child resulting from cruel and inhuman treatment.

Departures from the majority rule have been made most frequently when the parent carried liability insurance. Recognizing the insurer as the party really interested in the parent's defense, and considering that when the parent is insured there can be no basis for the public policy argument against the suit, some courts have refused to apply the immunity rule.[15] But to other courts the presence of liability insurance has made no difference. These courts assert that the existence of liability insurance does not create a cause of action where none exists otherwise.[16]

There are cases which depart from the majority rule on grounds other than those already mentioned. In one case, the fact that the plaintiff was an adopted son was determinative in the allowance of a suit for pain and suffering by a minor child against his father.[17] In another,[18] the court said

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[12] *See* Bullock v. Bullock, 45 Ga. App. 1, 8, 163 S.E. 708, 711 (1932); Cannon v. Cannon, 287 N. Y. 425, 429, 40 N.E. 2d 236, 238 (1942); Securo v. Securo, 110 W Va. 1, 2, 156 S.E. 750, 751 (1931).

[13] 189 Ore. 282, 218 P. 2d 445 (1950)

[14] 77 A. 2d 923 (Md. 1951)

[15] Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E. 2d 343 (1939); Lusk v. Lusk, 113 W Va. 17, 166 S.E. 538 (1932). *See* Lo Galbo v. Lo Galbo, 138 Misc. Rep. 485, 246 N. Y. Supp. 565 (1930).

[16] Villaret v. Villaret, 169 F. 2d 677 (D. C. Cir. 1948); Rambo v. Rambo, 195 Ark. 832, 114 S.W 2d 468 (1938); Bullock v. Bullock, 45 Ga. App. 1, 163 S.E. 708 (1932); Securo v. Securo, 110 W Va. 1, 156 S.E. 750 (1931).

[17] Brown v. Cole, 198 Ark. 417, 129 S.W 2d 245 (1939). The court took the position that the statutes prescribing the rights and duties of adopted children and adopting parents make no attempt to invest either the child or the parent with the natural affections that exist between blood relations; therefore the reason for the rule that prevents natural children from suing natural parents does not exist between adopted children and adopting parents.

[18] Minkin v. Minkin, 336 Pa. 49, 7 A. 2d 461 (1939)

[19] *Contra:* Damiano v. Damiano, 6 N. J. Misc. 849, 143 Atl. 3 (1928) (Action under wrongful death statute for wrongful death of children due to negligence of parent).

[20] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E. 2d 343 (1939).

[21] Some courts have held that the rule of parental immunity does not cancel an employer s liability on the principle of *respondeat superior* when the personal injury was inflicted by the parent acting as a servant. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107 (1930); Foy v. Foy Electric Co., 231 N.C. 161, 56 S.E. 2d 418 (1949); Wright v. Wright, 229 N.C. 503, 50 S.E. 2d 540 (1948)

[22] 158 Ohio St. 107, 107 N.E.2d 337 (1952) discussed p. 83 *infra.*